

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

H.Q. Energy Services (U.S.), Inc.

v.

New York Independent System Operator, Inc.

Docket Nos. EL01-19-000

EL01-19-001

EL02-16-000

EL02-16-001

PSEG Energy Resource & Trade LLC

v.

New York Independent System Operator, Inc.

ORDER ON MOTION FOR LIMITED WAIVER OF TARIFF DISPUTE
RESOLUTION PROVISIONS

(Issued June 22, 2004)

1. In this order, the Commission grants a motion by the New York Independent System Operator, Inc. (NYISO) for limited waiver of the dispute resolution provisions of NYISO's tariff. This action will benefit New York energy customers by enabling proceedings of this Commission and NYISO to proceed in an orderly fashion.

BACKGROUND

2. NYISO's tariff contains "Temporary Emergency Procedures" (TEP) under which, upon detection of a market design flaw, NYISO is authorized to recalculate market clearing prices as they should have been but for the market design flaw, and substituting the recalculated clearing prices for the prices that were actually charged. On May 12, 2000, NYISO exercised its TEP authority to recalculate clearing prices for several hours on May 8 and 9, 2000.

3. Two sellers of energy, H.Q. Energy Services (U.S.), Inc. (HQUS) and PSEG Energy Resources & Trade LLC (PSEG) filed complaints with the Commission challenging NYISO's action. The Commission denied those complaints.¹ PSEG appealed the Commission's ruling to the U.S. Court of Appeals for the D.C. Circuit,

¹ H.Q. Energy Services (U.S.), Inc. v. NYISO, 97 FERC ¶ 61,218 (2001) (Initial Order), reh. denied, 100 FERC ¶ 61,028 (2002) (Rehearing Order).

which on March 16, 2004 issued a decision holding that the Commission had failed to explain its actions, and remanded the matter to the Commission for further proceedings.²

4. Another seller, Aquila Energy Marketing Corporation (Aquila),³ which also objected to NYISO's use of its TEP authority to recalculate prices for May 8 and 9, 2000, sought to resolve its dispute through the dispute resolution procedures contained in NYISO's tariff. Under these dispute resolutions, Aquila and NYISO went to arbitration.⁴ By agreement of the parties, arbitration proceedings were held in abeyance pending the Commission proceedings on the HQUS and PSEG complaints, and then the subsequent court appeal.

5. NYISO has now filed a motion for expedited limited waiver of the dispute resolution provisions of its tariff (Articles 10 and 11) with regard to Aquila's claims, insofar as those provisions would otherwise require immediate arbitration of those claims. NYISO alleges that, now that the D.C. Circuit has issued its decision, Aquila has asserted its intent to revive the arbitration proceedings, and that, in response to a request by Aquila, the arbitrator has issued a schedule allowing Aquila to file a motion to lift the stay,⁵ to which NYISO must respond by July 2, 2004.⁶

6. NYISO states that the D.C. Circuit did not vacate the Commission's initial and rehearing orders, but remanded them for further explanation, and that this remand order will adjudicate the validity of NYISO's use of its TEP authority in May 2000. NYISO states that that future order will apply to all market participants, including Aquila, and that Aquila has no separate interest distinct from the parties whose rights will be adjudicated by the Commission's order on remand. According to NYISO, on remand,

² PSEG Energy Resources and Trade LLC v. FERC, 360 F.3d 200 (D.C. Cir. 2004) (PSEG).

³ "Aquila" also refers to Aquila Energy Marketing Corporations's successor in interest, Aquila Merchant Services, Inc.

⁴ Aquila alleges that parties seeking to challenge NYISO's exercise of its TEP authority had two mutually exclusive avenues to seek relief: they could either file a complaint with the Commission, as HQUS and PSEG did, or pursue dispute resolution under NYISO's tariff, as Aquila did. Aquila's Answer to Motion for Expedited Limited Waiver of Tariff Dispute Resolution Provisions (June 4, 2004) (Aquila Answer).

⁵ NYISO Motion for Expedited Limited Waiver of Tariff Dispute Resolution Provisions (May 20, 2004) (NYISO Motion).

⁶ Attachment to Supplement to NYISO Motion (May 24, 2004).

either the Commission will decide that NYISO correctly acted under its TEP authority to reset clearing prices for the entire market, or it will decide that NYISO erred and require NYISO to reinstate the original clearing prices. Thus, NYISO asserts, the remand order will also apply to Aquila.

7. NYISO asserts that it should, therefore, be permitted to waive the dispute resolution provisions and not be compelled to participate in arbitration, since any arbitration proceeding would either be redundant and wasteful, or could result in rate treatment for Aquila that will be different from the rate treatment that will be determined by the Commission's order on remand. NYISO states that the Commission has authority to waive tariff provisions for good cause, and has previously done so in these proceedings.⁷ NYISO further adds that, under the Commission's Rule 604, disputes are not appropriate for alternative dispute resolution, but should instead be resolved by the Commission, if (a) a definite or authoritative resolution of the matter is required for precedential value, (b) the matter involves significant questions of policy that may require further proceedings, and dispute resolution proceedings would not serve to develop a recommended policy, (c) maintaining established policies is of special importance, (d) the matter significantly affects parties who are not parties to the proceeding, or (e) a full public record of the proceeding is important.⁸ NYISO asserts that Aquila's arbitration proceeding falls within each of these categories.

8. Aquila filed an answer opposing NYISO's motion.⁹ It asserts that the D.C. Circuit's PSEG decision resolves the question of whether NYISO correctly exercised its TEP authority to correct prices on May 8 and 9, 2000, and that the Court definitively found that it did not. Aquila argues that the Commission is therefore obligated to reinstate the original clearing prices for those days, and may not do otherwise. Aquila further argues that NYISO may not "relitigate" or provide a new explanation for its decision to use its TEP authority. Aquila points to language in Attachment E of NYISO's Services Tariff, which requires NYISO to post its explanation of its choice to exercise TEP authority within five calendar days of that exercise, and thus asserts that NYISO may not now develop an explanation different from the one posted in May 2000. In response to NYISO's argument that Rule 604 provides that this is not the type of proceeding that is appropriate for alternative dispute resolution, Aquila states that, given

⁷ NYISO states that the Commission found that good cause existed to waive the provision of NYISO's TEP requiring NYISO to post notice that it was considering taking a corrective action within 24 hours of the prices which the NYISO was correcting. NYISO Motion at 7, citing Initial Order at 61,964-965.

⁸ NYISO Motion at 9-10, citing 18 C.F.R. § 385.604(a)(2)(i) – (v) (2003).

⁹ Aquila also sought leave to file its answer one day out of time.

that the D.C. Circuit has now made a ruling that will serve as precedent that both the Commission and the arbitrator will be required to follow, no inconsistency or other problem will result if the arbitration proceeds and reinstates the original clearing prices for all market participants.¹⁰

DISCUSSION

9. With regard to procedural questions, we will grant Aquila's motion for leave to file its answer out of time, and the NYTOs' motion to intervene.

10. With regard to substantive questions, we will grant NYISO's motion. Aquila asserts that the D.C. Circuit's PSEG decision fully resolves the question of whether NYISO properly exercised its TEP authority. It further states that NYISO may not now develop another explanation of why it exercised that authority. This is an incorrect understanding of PSEG. In that decision, the D.C. Circuit found that the Commission, not NYISO, failed to provide an adequate explanation of its reasoning in finding that NYISO properly exercised its TEP authority. The court stated that "FERC fail[ed] to respond cogently to PSEG's argument that no market flaw existed" that would permit the exercise of NYISO's TEP authority, and therefore the Commission would have to address this question on remand.¹¹ The court's decision did not mandate a specific outcome; rather, the court returned the case to the Commission to issue a further order. Thus, the Commission's ultimate determination on remand as to whether NYISO properly exercised its TEP authority is not foreclosed by PSEG.

11. Accordingly, since the court's ruling has not definitively addressed the issue, and the Commission has not issued an order on remand, it is appropriate to continue to stay the arbitration.

12. We therefore grant NYISO's motion for limited waiver of the alternative dispute resolution provisions of its tariff insofar as those provisions would require active arbitration of those claims before the Commission issues its order on remand.

¹⁰ The New York Transmission Owners (NYTOs) filed a motion to intervene and comments, in which they supported NYISO's position.

¹¹ PSEG, 360 F.3d at 205.

The Commission orders:

The Commission hereby grants the relief requested by NYISO, as discussed above.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.